

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE JAMES DONATO

IN RE FACEBOOK BIOMETRIC)
INFORMATION PRIVACY LITIGATION)
)
) No. C 15-3747 JD
-----)
)
FREDERICK WILLIAM GULLEN, on behalf)
of himself and all others similarly)
situated,)
) No. C 16-0937 JD
Plaintiff,)
vs.)
) San Francisco, California
FACEBOOK, INC.,) November 30, 2017
) 10:00 a.m.
Defendant.)
_____)

TRANSCRIPT OF PROCEEDINGS

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Thursday - November 30, 2017

10:06 a.m.

P R O C E E D I N G S

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THE CLERK: Calling related actions Civil 15-3747, In Re Facebook Biometric Privacy Litigation, and Civil 16-937, Gullen versus Facebook.

Counsel, please state your appearances for the record.

MR. TIEVSKY: Good morning, your Honor. Alexander Tievsky for the In Re Facebook Biometric plaintiffs.

MR. MILIAN: Good morning, your Honor. David Milian for Frederick Gullen.

MS. GOLDMAN: Good morning, your Honor. Lauren Goldman for Defendant Facebook. I'm here with my client Nikki Sokol of Facebook.

THE COURT: Tievsky?

MR. TIEVSKY: Tievsky.

THE COURT: Are you driving on the plaintiff's side today?

MR. TIEVSKY: Yes, your Honor.

THE COURT: Okay, good. All right.

All right. Well, Facebook has brought the motion. You do have the burden under jurisdictional issues.

MR. TIEVSKY: Would you like me to begin, your Honor?

THE COURT: Yes, please.

MR. TIEVSKY: So I think that --

1 **THE COURT:** Just to jump in, there are two things I'm
2 most interested in, but I'll share that with you as we go
3 along.

4 **MR. TIEVSKY:** Okay. So I guess I would like to start
5 with the -- I think the landscape became on these issues much
6 clearer yesterday.

7 **THE COURT:** Yesterday?

8 **MR. TIEVSKY:** Yesterday, your Honor. We filed --

9 **THE COURT:** What happened yesterday? Oh, that thing
10 you filed? Okay.

11 **MR. TIEVSKY:** Yes. The Ninth Circuit issued an
12 opinion --

13 **THE COURT:** I don't mean it to be deflationary, but
14 go ahead.

15 **MR. TIEVSKY:** No, it's fine.

16 The Ninth Circuit issued an opinion in *Eichenberger v*
17 *ESPN*, which was a Video Privacy Protection Act case. It was
18 quite clear that this is a statute that generally protects
19 privacy interests; that it is a context specific extension of
20 the right to privacy by statute and that any invasion of that
21 right is a concrete injury in fact that's sufficient for
22 standing.

23 And that lines up with the rest of the Ninth Circuit
24 authority on this issue. In *Van Patten*, the *TCPA* case, as this
25 Court pointed out about a year ago when we had the last hearing

1 here, you know, if anything, this is more invasive than a text
2 message or phone call. And Facebook's response to that last
3 time was: Well, there are other District Court case that's
4 found a TCPA violation is not good enough for standing. And
5 that argument is now foreclosed by the Ninth Circuit in
6 *Van Patten*.

7 So I think, I think that pretty much answers the question,
8 you know, the only other things that came up where Facebook
9 argued: Well, it's the harassment, or in *Spokeo* the loss of a
10 job opportunity that created the standing. And, you know, the
11 Ninth Circuit has been very clear since then that that's not
12 the case.

13 In *Spokeo* the Ninth Circuit said it's not the fact that he
14 lost a specific job opportunity.

15 In *Eichenberger* the other day the Ninth Circuit says it's
16 not -- you know, the statute doesn't protect against
17 harassment. The statute protects against violations of
18 privacy. That's what we've got here. That's really the main
19 point.

20 There is an unpublished Second Circuit case, *Take-Two* that
21 does involve this statute that came out the other week. That's
22 a very different factual scenario.

23 **THE COURT:** That's *Vigil*, right?

24 **MR. TIEVSKY:** That's the one, yes, your Honor.

25 **THE COURT:** That was last week?

1 **MR. TIEVSKY:** A few weeks ago, I guess.

2 **THE COURT:** Okay. Well, let me ask you this. What
3 do you think the concrete injury is alleged in the Complaint?

4 **MR. TIEVSKY:** The concrete injury is the invasion of
5 privacy caused by the collection of the biometric identifier,
6 the face print, right? So that invasion of plaintiff's and
7 putative class members' privacy is a concrete injury in fact
8 because, as the Ninth Circuit explained in *Eichenberger*, the
9 Illinois legislature made a context specific extension of the
10 right to privacy. That's well grounded in common law, as your
11 Honor pointed out last time, in the Illinois Constitution, too.
12 And that's an interesting thought.

13 **THE COURT:** Less pass on that for a moment. What
14 exactly was the invasion in this case? How was your client's
15 privacy invaded?

16 **MR. TIEVSKY:** It's the unauthorized collection of the
17 biometric identifier of the face print. So a picture gets
18 uploaded, maybe by them, maybe by somebody else, and without
19 telling them what they are doing -- I understand Facebook has
20 some ideas about consent and what their data policy says, but
21 it is not obvious that this is what they are doing and, yet,
22 they are taking these pictures. They are scraping the
23 biometric identifiers off of it.

24 It's like if you put your hand up to this like a picture
25 and they took your fingerprint off it. You're not expecting

1 them to do it. And they have not gotten consent to do it.

2 And, yet, they are taking this very private information that
3 the Illinois legislature tried to protect.

4 **THE COURT:** So we have been churning along here for a
5 good long time and is it the plaintiff's position that there is
6 no evidence that Facebook did a notice and consent for tagging
7 people under the BIPA; is that right?

8 **MR. TIEVSKY:** There is no evidence that there is --
9 that there is sufficient consent that a person could reasonably
10 understand that this is what they are doing.

11 You know, maybe if you sat in a deposition with Facebook's
12 lawyer for two hours and they walked you through everything and
13 explained what they thought it meant, you might understand it.

14 But -- but, no. Looking at it on its face, it's not
15 obvious. They don't get consent and they don't disclose what
16 they are doing.

17 **THE COURT:** What do you understand -- this is the
18 issue, one of the issues I want to raise because I'm quite
19 interested in it. What do you understand the function of
20 consent to be under the BIPA?

21 **MR. TIEVSKY:** The function of subsequent -- I mean,
22 this is a consent-based statute, right? It doesn't -- the
23 whole idea is to facilitate biometric transactions, right?

24 So the function of consent is to -- so that the consumer
25 or whoever's biometric information is being collected has

1 control over their own biometrics, right? These things that
2 are very personal to their body.

3 **THE COURT:** And under your reading of the BIPA, when
4 is consent supposed to be obtained from the consumer?

5 **MR. TIEVSKY:** Before the information is collected.

6 **THE COURT:** Okay.

7 **MR. TIEVSKY:** If you collect the information without
8 consent and you haven't gotten it and you collect it, then
9 you've violated the statute.

10 **THE COURT:** All right. Now, I think that's going to
11 be the heart of the issue on whether that's concrete and
12 particularized enough, but to round this out, I did not see --
13 this is your chance to tell me if I missed it. I did not see
14 any substantive allegations in the Complaint or anywhere else
15 that Facebook has monetized the biometric data, sold it,
16 misused it in any way; is that right? You're not contending
17 that?

18 **MR. TIEVSKY:** We're not contending that. I don't
19 think that's required by the statute.

20 **THE COURT:** Well, I understand, but you're not --
21 you're not contending that the -- your clients have been harmed
22 in any way by misuse of the biometric data?

23 **MR. TIEVSKY:** We are in the sense that it is -- it is
24 misuse to have it at all.

25 **THE COURT:** Leaving that aside, you're not -- just

1 talking practically here, okay? You're not contending that
2 Facebook sold to it a third party, used it for advertising
3 purposes or did anything else downstream from the actual
4 collection that has harmed your client; is that right?

5 **MR. TIEVSKY:** No. We don't believe that any
6 consequential harm -- we don't know if any consequential harm
7 resulted. We haven't found that it happened. We don't
8 think --

9 **THE COURT:** You're not planting your flag on
10 downstream harm.

11 **MR. TIEVSKY:** That's correct.

12 **THE COURT:** Okay, good.

13 All right. Let me hear from Facebook. So what is your
14 understanding of the consent function under the BIPA?

15 **MS. GOLDMAN:** The consent function in the BIPA
16 requires a defendant to obtain informed consent from people
17 from whom it collects biometric data. That's the purpose of
18 the statute.

19 But what the plaintiffs haven't alleged is that to the
20 extent Facebook failed to comply with the letter of BIPA, it
21 harmed them. They don't say in the Complaint and they didn't
22 say in their deposition that they suffered any form of harm as
23 a result of Facebook's alleged failure to comply with the
24 letter of BIPA. And Facebook --

25 **THE COURT:** Let me just jump in on that.

1 They were denied the right to say no. Why isn't that a
2 cognizable harm?

3 The way I read BIPA it says: Before you do this, before
4 you collect what the Illinois state legislature has declared to
5 be the unique biometric identifiers of you, as a person, you
6 need to have -- you need to give the person whose data you're
7 collecting the right to say no. And Facebook didn't do that.

8 That seems to me to be a highly concrete and
9 particularized harm. I mean, taking away the right to say no
10 is a deprivation.

11 **MS. GOLDMAN:** Your Honor, putting to one side the
12 fact that Facebook did disclose what it was doing, that it said
13 so in its data policy --

14 **THE COURT:** I do want to get to that.

15 **MS. GOLDMAN:** Putting that to one side, what the
16 Court has identified is the alleged violation of the statute.

17 But under the Ninth Circuit's remand decision in *Spokeo*
18 *II*, under the Supreme Court's decision in *Spokeo I*, plaintiffs
19 can't just say: You denied me the right to say no. They have
20 to say that they were harmed as a result. And they have
21 steadfastly refused to identify any harm that has come to them
22 as a result of that violation. They have not said, for
23 example, that they would have said no.

24 **THE COURT:** Well, let me jump in. I have a different
25 reading of Ninth Circuit law.

1 So in *Syed vs M-1*, 853 F.3d 492 at 499, this is, gosh;
2 eight months ago, March 2017. The Circuit held that a portion
3 of the FCRA, quote:

4 "Creates a right to privacy by enabling
5 applicants to withhold permission to obtain the report
6 from the perspective employer and a concrete injury
7 when applicants are deprived of their ability to
8 meaningfully authorize the credit check."

9 In other words, I happen to agree with this. The right to
10 say no is a valuable commodity, particularly when it comes to
11 decisions about controlling the absolutely most personal
12 aspects of your life: Your face, your fingerprints, who you
13 are to the world.

14 So I don't see how saying no is just a procedural
15 violation. That's a big deal.

16 **MS. GOLDMAN:** Here is why, your Honor. I would point
17 the Court to Page 499 of that same opinion.

18 **THE COURT:** I just read from 499.

19 **MS. GOLDMAN:** But I want to point you to different
20 language on that page.

21 The Court in *Syed* withdrew its opinion and reissued it to
22 make clear that you have to look at what Syed's allegations of
23 harm were.

24 And the Court says:

25 "We can fairly infer that Syed was confused by

1 the inclusion of the liability waiver with the
2 disclosure and would not have signed it had it
3 contained a sufficiently clear disclosure, as required
4 in the statute."

5 The plaintiff made allegations from which the Court
6 inferred that he would have done something differently had the
7 Defendant complied with the statute.

8 And that is what these plaintiffs have steadfastly refused
9 to do. They have not said -- they have not even said: I'm
10 upset that Facebook took this information from me. We have now
11 deposed three out of the four named plaintiffs. Each one of
12 them said that they were not harmed by this.

13 The whole point of these *Spokeo* cases, and all of the
14 other cases that have addressed standing after *Spokeo*, is that
15 you can't have a case where the plaintiff says: I'm not harmed
16 and you have these lawyer-driven, no injury class actions.

17 These people under oath were asked if they could identify
18 any harm that had come to them as a result of Facebook's use of
19 facial recognition, as a result of Facebook's analysis of
20 photos that they and their friends had voluntarily uploaded.

21 **THE COURT:** Let me just jump in.

22 I think you all agree on that, as I understand it, and the
23 plaintiffs are not saying Facebook in any way misused it. So
24 you're all on the same page with that.

25 **MS. GOLDMAN:** And --

1 **THE COURT:** But -- but the point is the one I raised
2 earlier, which is Illinois gave its citizens the right to say
3 no and Facebook -- the allegation is Facebook usurped that
4 right. And that is not a mere technicality, in my view.

5 **MS. GOLDMAN:** And that is --

6 **THE COURT:** Let me just jump to, so what do you
7 think -- so we agree there is no formal BIPA notice that
8 Facebook sent out, right?

9 **MS. GOLDMAN:** I'm not conceding that, but we can --

10 **THE COURT:** If you're not conceding it, tell me where
11 it is.

12 **MS. GOLDMAN:** Facebook informed users that it was
13 analyzing their photos and that it was going to -- what
14 Facebook said was that -- in the data policy, which the Court
15 found that the plaintiffs agreed to, it said:

16 "We are able to suggest that your friend tag you
17 in a picture by comparing your friend's pictures to
18 information we put together from your profile pictures
19 and the other photos in which you have been tagged.
20 If this feature is enabled for you, you can control
21 whether we suggest that another user tag you in the
22 photo using the timeline and tagging settings. We
23 store data for as long as it's necessary to provide
24 products and services to you and others."
25 So in plain English it's was saying we're analyzing the

1 photos your friends upload. We're analyzing the photos in
2 which you have been tagged. We are comparing the two and we
3 use that in order to suggest that your friends tag you in a
4 photo, and here is how you can turn it off.

5 **THE COURT:** But did Facebook anywhere say -- I didn't
6 see it, so you can tell me if I missed it.

7 Where, if anywhere, did Facebook say expressly that a
8 biometric identifier is being collected or stored?

9 **MS. GOLDMAN:** It did not use those words. But, first
10 of all, I mean, as the Second Circuit observed last week in the
11 *Vigil* case, plaintiffs don't allege that had Facebook used
12 magic words like "biometric identifier" or "face print," they
13 would have done anything differently.

14 Facebook was telling them what it was doing with this
15 information. They chose to interact with Facebook. They chose
16 to agree to Facebook's terms. And Facebook informed them what
17 it was doing with their information. That's enough.

18 And I -- I just want to go back to the Court's earlier
19 point. What the court is focusing on is the statutory
20 violation, but that's only half the question. The other half
21 of the question is what harm did that cause?

22 And if the Court looks at the remand decision in *Spokeo*,
23 it's clear that this is an integral part of the analysis. It's
24 what does the plaintiff allege in terms of concrete real-world
25 consequences of the Defendant's statutory violation.

1 So the Ninth Circuit in the *Robins* case said that the
2 plaintiff had specifically alleged -- and I'm -- here I'm
3 quoting:

4 "He's out of work and looking for a job, but that
5 *Spokeo's* inaccurate reports have caused actual harm to
6 his employment prospects by misrepresenting facts that
7 would be relevant to employers and that he suffers
8 from anxiety and stress and concern and/or worry about
9 his diminished prospects as a result."

10 If all that Mr. Robins had to show was that *Spokeo* had
11 violated FCRA, that would have been the end of the discussion.
12 The Court would have no need to analyze these personalized
13 allegations of what happened to him as a result.

14 What the Court said is that the plaintiff has to allege
15 that the violation caused him to suffer some harm that actually
16 exists in the world. That's real-world harm. That's what the
17 plaintiffs here are saying they don't have to show. Not only
18 have they not alleged it, they have testified that they haven't
19 suffered it.

20 So, I mean, Mr. Pezen was asked at his deposition whether
21 he could identify any harm, any harm that has occurred to you
22 because of tag suggestions, and he said, "No. Personally, no."

23 So you can't have -- I mean, the point of this is to see
24 whether there is a case or controversy. How can there be a
25 case or controversy when their clients say: I haven't been

1 harmed.

2 I mean, it's even more remote -- I want to talk for a
3 minute about the Gullen case, which is the non-users.

4 Mr. Gullen at his deposition said: What I'm really upset about
5 is there is a template of my face associated with my identity
6 sitting on Facebook's server.

7 There's not. We have shown there is not. He's a
8 non-user. Facebook doesn't know who Mr. Gullen is, what he
9 looks like, what his face looks like, how to find him, anything
10 about him. Facebook knows nothing about him. He doesn't use
11 Facebook.

12 **THE COURT:** Well, what's troubling me is that
13 Illinois granted its citizens the right to say no, to control
14 their data, and that was -- they were deprived of that.

15 It's hard for me to see how that's not enough. You can't
16 grant a statute that says your biometric data is unique and
17 special and valuable and you have the right to control whether
18 somebody can harvest it and what they can do with it. And the
19 threshold of that is you have to be told a company is going to
20 use your biometric data or collect it. You have to be given
21 the opportunity to say: Please, do not do that. That did not
22 happen here.

23 **MS. GOLDMAN:** They were given the opportunity --

24 **THE COURT:** Well, I don't -- you're reading a lot
25 into high level waiver now or terms of use agreement.

1 I'm still reflecting on that, but I do think this is not a
2 mere misuse of a zip code or some other technical violation
3 under a statute. This is who you are and Illinois saying you
4 have the right to have some hand in how that's collected and
5 used.

6 **MS. GOLDMAN:** That's the statutory --

7 **THE COURT:** And depriving people of that is a
8 problem.

9 **MS. GOLDMAN:** But it's not -- that's the statutory
10 right. That's only half the analysis, your Honor. You still
11 have to look at what the harm was that flowed from that.

12 Plaintiffs are relying on this *Eichenberger* case that came
13 down yesterday from the Ninth Circuit. And that's actually
14 very instructive because what *Eichenberger* was about was the
15 misuse of the plaintiff's data and the sharing of it with third
16 parties.

17 So what ESPN did was it gathered information about the
18 plaintiff's video watching habits and it shared that
19 information with an analytics company. And what the court said
20 was that this was a substantive violation and not a procedural
21 one because they shared it with third parties.

22 And we've always said in all of our briefing on this and
23 the Courts have always said that when you share information
24 with third parties against the will of the person from whom you
25 conflicted it, that can be a per se violation. That was the

1 Third Circuit's decision in *Nickelodeon*. *Eichenberger* is
2 totally consistent with that.

3 But that's not what happened here. What plaintiffs are
4 saying, the user plaintiffs are saying is that they chose to
5 join Facebook. They chose to have their photographs on
6 Facebook and that Facebook gathered information about them and
7 it's sitting there securely on Facebook's servers. They are
8 not alleging that it could --

9 **THE COURT:** I really don't think -- you're -- you're
10 barking up a plus tree that I don't think actually exists. And
11 the reason I don't think -- I mean, the Supreme Court has held
12 long before *Spokeo*, harkening back to *Ward v Selden*, that:

13 "Illegally protected interests may exist solely
14 by virtue of statutes creating legal rights, the
15 invasion of which creates standing."

16 You don't have to show that you were granted a statutory
17 right and then you lost your arm or your bank account was
18 seized or your house was burned down or you lost a job. The
19 statutory right alone can create the -- the image of a
20 statutory right alone is enough.

21 **MS. GOLDMAN:** Your Honor, that's exactly what the
22 Supreme Court said in *Spokeo* was not enough. Some statutes --

23 **THE COURT:** I was just reading from *Vigil*. It's a
24 post-*Spokeo* case.

25 **MS. GOLDMAN:** Yes, some statutes street rights that

1 standing alone are enough. A notice and consent statute does
2 not.

3 So I would point the Court, for example, to the Ninth
4 Circuit's remand opinion in *Spokeo II*, to the footnote where
5 the Court says: We're focusing on the particular provisions of
6 FCRA that Mr. Robins is invoking here which govern the
7 dissemination of inaccurate information about him to third
8 parties.

9 The Court specifically says he was originally proceeding
10 under other sections of the statute, which did not involve the
11 dissemination of information about him. And those would have
12 caused great difficulty for his standing argument. This is
13 footnote two of the opinion.

14 He's now said that he's no longer proceeding under those
15 provisions. So we're just looking at the particular provisions
16 of the statute that govern the unauthorized dissemination of
17 information. The Court said --

18 **THE COURT:** Let me just jump in.

19 You keep saying something I just don't think is right.
20 The Supreme Court expressly said in *Spokeo*:

21 "The violation of a procedural right granted by
22 statute can be sufficient to constitute injury in
23 fact."

24 136 Supreme Court at 1549.

25 You keep saying that they didn't say that or they

1 retracted it. It's just not true. *Spokeo* says plain as day a
2 procedural right in and of itself can, when deprived, be enough
3 for standing.

4 **MS. GOLDMAN:** The Court was talking about a narrow
5 category of statutes, like statutes that say the government
6 can't restrict your right to freedom of speech or freedom of
7 religion or the situation in *Havens* where the person was, you
8 know, harmed by the fact that the Defendant was engaging in
9 racially discriminatory housing practices.

10 The Court was not saying a violation of any old statute
11 standing alone were enough. That was the whole point of the
12 decision.

13 **THE COURT:** No one here is saying any old statute is
14 enough. We're saying here that the BIPA granted a substantive
15 right to say no. That's what we're talking about.

16 It's not any old statute, counsel. We're talking about
17 the case in front of us.

18 **MS. GOLDMAN:** The --

19 **THE COURT:** Anyway, let's hear from Mr. Tievsky.
20 Anything in response?

21 **MR. TIEVSKY:** I do. I have a couple things, your
22 Honor.

23 **THE COURT:** Yes.

24 **MR. TIEVSKY:** The first is that the *Spokeo* itself,
25 were represented by the same counsel, is extremely unhappy with

1 the decision from the Ninth Circuit and is petitioning for
2 *certiorari* again --

3 **THE COURT:** Well, let's not characterize, counsel.
4 Just talk about the law.

5 **MR. TIEVSKY:** Sure.

6 With regard to *Eichenberger*, and counsel's reading of it
7 is pretty aggressive. The Court concluded that the VPPA
8 codified, I'm quoting here:

9 "...a context specific extension of the
10 substantive," in italics, "right to privacy."

11 And then:

12 "Accordingly every," again in italics,
13 "disclosure of an individual's personally identifiable
14 information and video viewing history offends the
15 interest the statute protects."

16 In other words, when a statute protects a substantive
17 right, which this Court has already found that BIPA does, then
18 that's -- that's enough for standing.

19 And I'd add that it's not about embarrassment or
20 harassment or any kind of consequence or harm flowing from
21 that. It's not even limited to disclosure. So the
22 reasoning --

23 **THE COURT:** I mean, don't you agree the Illinois
24 statute was saying you have the right to say: No, don't do
25 this unless I give you my permission. Right? I mean, isn't

1 that sort of the core of your case?

2 **MR. TIEVSKY:** Yes, your Honor. It is absolutely the
3 core. The core is -- I'm quoting from *Eichenberger* again:

4 "Ensuring that consumers retain control over
5 their personal information."

6 I think that's another way of saying the right to say no.

7 I don't -- I agree with the Court. I don't think that
8 there is any need to demonstrate any more than that.

9 With regard to the depositions of our clients, harm -- we
10 have been standing here arguing about it for an after hour now.
11 It's --

12 **THE COURT:** What's that?

13 **MR. TIEVSKY:** We have been standing here talking
14 about it for some time now. Eight Justices of the Supreme
15 Court had to write three opinions to decide what harm meant.
16 If you ask a layperson, "Have you been harmed?" that is not a
17 meaningful question and their answers are not meaningful in
18 terms of have they been injured in fact.

19 In any event, the question gets at the downstream harm
20 that, as the Ninth Circuit has held and as the Court pointed
21 out, just isn't required by the law. Never has been.

22 **THE COURT:** Well, but it doesn't really matter
23 because you're not arguing it anyway, right?

24 **MR. TIEVSKY:** And we're not arguing it anyway.

25 **THE COURT:** Okay.

1 **MR. TIEVSKY:** The last very small thing is the user
2 agreement --

3 **THE COURT:** Can I ask you one other question? Sorry.
4 We'll get to that.

5 **MR. TIEVSKY:** Sure.

6 **THE COURT:** In some ways this is really just a fight
7 about which court you're going to be in, right? If for some
8 reason -- this is a hypothetical. No one should read anything
9 into this. But if for some reason it turns out maybe it's not
10 enough to have Article III standing, you just go back to
11 Illinois.

12 **MR. TIEVSKY:** For one of the cases.

13 **THE COURT:** For Illinois state court.

14 **MR. TIEVSKY:** For Mr. Licata's case.

15 For the other two plaintiffs, they filed initially in
16 federal court, so their cases would be dismissed without
17 prejudice.

18 **THE COURT:** They could refile.

19 **MR. TIEVSKY:** They could refile, yes.

20 **THE COURT:** Isn't there some attraction to letting an
21 Illinois Court interpret an Illinois state statute?

22 **MR. TIEVSKY:** There could be.

23 **THE COURT:** Rather than a little old District judge
24 out here in San Francisco. Isn't there some charm in letting
25 the home team handle it?

1 **MR. TIEVSKY:** Certainly. I'm an Illinois attorney.
2 I don't mind handling it --

3 **THE COURT:** Are you? You're from Chicago?

4 **MR. TIEVSKY:** I am. I'm admitted pro hac vice to
5 this court. I certainly don't mind litigating in Chicago.

6 I would say that it could create an unnecessary personal
7 jurisdiction fight. Facebook is down the street. And, you
8 know, Facebook is the one who asked to transfer out here. You
9 know, it frankly -- you know, we're certainly happy to be in
10 this courtroom. We're happy to be in Chicago, too.

11 **THE COURT:** I see, okay.

12 Did you want to add something?

13 **MR. TIEVSKY:** Yes, just one more. One more thing on
14 the data policy. I'm looking at Exhibit A On docket 236, which
15 is the complete data policy unobscured by a dialogue box.

16 Counsel talked about the information at issue.
17 Information is actually -- it's not a defined term, but it's
18 explained and it says:

19 "This can include information in or about the
20 contents you provide, such as the location of a
21 photo" --

22 **THE COURT:** Where are you in this?

23 **MR. TIEVSKY:** Excuse me. So if you've got Exhibit A
24 in Docket 236, it's that first bullet point under Section 1.

25 **THE COURT:** Yes, I have it.

1 **MR. TIEVSKY:** "Things you do and information you
2 provide."

3 **THE COURT:** Okay.

4 **MR. TIEVSKY:** So that's where it explains what the
5 information is. The portion that counsel quoted from is later
6 on, what they do with the information.

7 So such as the location of a photo or the date a file was
8 created. Now, that's very different from scraping a face
9 print, right? These are metadata. They are saying, yeah, we
10 can look at the file itself, locations. That's not even close
11 to what they are actually doing. And it's -- you know, to the
12 degree that this could -- that the later section would be read
13 sort of vaguely to say what they are doing, this is highly
14 misleading.

15 **THE COURT:** Did this -- I'm just curious. Maybe
16 Facebook might know better, but did this language on the
17 "Things you do and information you provide," did that language
18 precede the use of tagging? The creation of tagging?

19 **MS. GOLDMAN:** The disclosures about tagging have
20 changed over time. Facebook rolled out user notifications
21 starting in the middle of 2010, six months before it started
22 using facial recognition. The disclosures have changed over
23 time. Substantively that language has been in place since, I
24 believe, about 2013.

25 But the point is --

1 **THE COURT:** Is that pre-tagging?

2 **MS. GOLDMAN:** No. It is mid-tagging.

3 **THE COURT:** Mid-tagging, okay.

4 **MS. GOLDMAN:** The point, your Honor, is, first of
5 all, the language that counsel was just reading to you said
6 "information can include." It was giving examples of the types
7 of information that Facebook might obtain.

8 The language that I read to you is the more specific
9 language about what it's doing with facial recognition. It's
10 gathering information from photos your friends upload and
11 comparing that to information that we've gathered from your
12 photos. So that's much more specific in terms of the facial
13 recognition.

14 But more broadly, plaintiffs have conceded that they are
15 not alleging any misuse of this information. And they are
16 relying on Eichenwald for the -- sorry, *Eichenberger* for the
17 proposition that this is a substantive right.

18 What *Eichenberger* says about this is that:

19 "Although the FCRA outlines procedural
20 obligations that sometimes protect individual
21 interests, the VPPA identifies a substantive right to
22 privacy that suffers any time a video service provider
23 discloses otherwise private information to third
24 parties."

25 That's the point. The point is that the VPPA says you

1 can't gather information about people and then disclose it to
2 third parties. They have conceded that that's not what they
3 are alleging Facebook did here.

4 Facebook analyzed photos that were uploaded to Facebook
5 about people who chose to interact with Facebook?

6 **THE COURT:** Well, but the BIPA starts by saying you
7 have to advise people you're doing it and get their consent.
8 There are arguably two lawyers to BIPA.

9 **MS. GOLDMAN:** Exactly, your Honor.

10 **THE COURT:** First, you have to get notice and
11 consent. And after that, even if you do notice and consent,
12 you still can't misuse the data. I don't see those as
13 mutually -- they are not in conflict.

14 **MS. GOLDMAN:** They are not in conflict at all, but
15 they are very different provisions of the statute.

16 **THE COURT:** And I think you properly say the
17 plaintiffs are not -- the second part, they are not on. They
18 are not worried about misappropriation --

19 **MS. GOLDMAN:** Correct.

20 **THE COURT:** -- or misuse.

21 **MS. GOLDMAN:** And those are the substantive portions
22 of the statute.

23 **THE COURT:** That's the question.

24 **MS. GOLDMAN:** It is the question. And that's the
25 argument that I'm making, your Honor.

1 **THE COURT:** Yes, I know. I understand.

2 **MS. GOLDMAN:** And that's what the Ninth Circuit said
3 in *Spokeo* on remand. It said *Robins* -- what this case stands
4 for is the proposition that the Court has to do two things. It
5 has to look at each particular provisions of the statute that
6 the plaintiff is invoking and say: Does this protect concrete
7 rights? Is this substantive or procedural?

8 Then it has to say: Okay, and what harm flowed from that?
9 If plaintiffs didn't have to allege what harm flowed from the
10 violation, then there was no need for the Ninth Circuit to
11 spend so much time talking about the fact that Mr. Robins was
12 out of work; that these mis- -- that these misstatements in the
13 report had harmed his prospects --

14 **THE COURT:** Well, you know, there is a long -- I just
15 happened to look at this in the context of another
16 constitutional case. There is a long and distinguished line of
17 Supreme Court cases talking about the right to be left alone.
18 In other words, the right to say no, you can't do this to me.
19 I don't want to hear this. I don't want to see this. I don't
20 want you to collect this.

21 **MS. GOLDMAN:** They haven't alleged that.

22 **THE COURT:** That is not just the check the box on a
23 procedural point. That is a time honored constitutional right,
24 the right to be left alone. And BIPA I think, you know,
25 arguably is giving Illinois citizens the right to have their

1 biometric data left alone unless they say in advance: I
2 consent to you using it.

3 **MS. GOLDMAN:** But they still have to under -- under
4 this whole line of decisions, they still have to allege that
5 they wanted to be left alone and that they didn't want this
6 information to be gathered about them without their consent.
7 They have to allege that and they have refused to do that.

8 We said in our reply brief on this motion, you know, we --

9 **THE COURT:** They refused to do it.

10 **MS. GOLDMAN:** They refused to allege that they didn't
11 want Facebook to take this information.

12 **THE COURT:** Is that right, Mr. Tievsky?

13 **MR. TIEVSKY:** If we wanted Facebook to take this
14 information, I don't think we would have sued Facebook. Being
15 upset is not enough for a lawsuit. You can't sue because
16 you're angry.

17 **THE COURT:** You might be surprised. But go ahead.

18 **MR. TIEVSKY:** Being angry has never been enough. You
19 have to allege that they violated the law, right, and that the
20 law is -- and I should add in *Spokeo* the Ninth Circuit said:

21 "It is of no consequence how likely Robins is to
22 suffer additional concrete harm as well," additional
23 in italics," such as the loss of a specific job
24 opportunity."

25 What's -- what was enough in *Spokeo* was the creation of an

1 inaccurate consumer report.

2 What's enough here is, as your Honor pointed out,
3 deprivation of the right to say no to collection of this --
4 this highly personal information. That's all. That's enough.

5 **MS. GOLDMAN:** That's just not what the Court said.
6 They are ignoring what the Court said. The Court said it's not
7 enough that it just said inaccurate things in a report
8 somewhere.

9 What the Court said was, yes, you don't have to allege
10 additional harm beyond the fact that you were out of work; that
11 these misrepresentations about you harmed your job prospect and
12 that as a result of that, you -- you suffered from anxiety,
13 stress and concern.

14 In fact, the Court said at footnote three:

15 "We don't consider whether a plaintiff would
16 allege a concrete harm if he alleged only that a
17 materially inaccurate report about him was prepared by
18 never published."

19 You have to show real-world harm. This is not something
20 that the lawyers can cook up. The plaintiff -- it's not that
21 being angry alone is not enough, but the statutory violation
22 alone is also not enough. You need both. You need to show
23 that the statute was violated and that that harmed you; that
24 you would have done something differently had the statute been
25 complied with; that it harmed your privacy in some specific

1 way.

2 You can't just say privacy rights were violated. Rights
3 and harm were two different things. And that's what they are
4 just refusing to do.

5 **THE COURT:** All right. Thank you. It's all very
6 interesting. I'll get this out when I can.

7 Before you leave, what else is happening generally?

8 **MR. MILIAN:** Judge? If I may, just for the Gullen
9 plaintiff.

10 **THE COURT:** Yes.

11 **MR. MILIAN:** Two quick points that distinguishes
12 Gullen a little bit.

13 **THE COURT:** All right.

14 **MR. MILIAN:** We're completely consistent with the
15 user plaintiffs on this argument.

16 Gullen, though, is a non-user. He was never shown any
17 data policy or privacy use form as a result of his status. He
18 was never on Facebook. So he specifically never consented, in
19 no way could have ever wanted in to happen to him.

20 So that's -- that's clear as to Gullen.

21 **THE COURT:** I understand that. I just -- I'm
22 hesitant even to ask, but just out of curiosity, how is
23 Facebook supposed to reach somebody like that?

24 Maybe there is an argument that they could contact their
25 own users, but, I mean, how do you -- Facebook can't alert

1 310 million Americans: You're at risk of being tagged.

2 I just -- I have no problem with that side of -- your
3 side. I just don't get it. What are they supposed to do?
4 Just tell me.

5 **MR. MILIAN:** Well, BIPA is a negligence statute, so
6 it's not a strict liability statute. If a -- someone who wants
7 to take biometric information can do it as long as they act
8 reasonably, okay? And so one way they might be able to --
9 Facebook and others might be able to comply with the statute is
10 as, you know, photos are -- before a photo, biometric face
11 tagging or face scanning technology is applied, once a photo is
12 uploaded from an Illinois IP address, it -- it's definable as
13 something coming from Illinois. Before any facial recognition
14 technology is applied to that photo, you can second a box to
15 say: Hey, we see this is coming from Illinois. Do you
16 consent? And a long list of things that you consent to, check
17 the box: Yes, I do. And that's that.

18 **THE COURT:** Well, suppose you're an Illinois family
19 at the Grand Canyon and you take the rim crater shot and you do
20 what everybody in my family does, you immediately upload it on
21 site. How are they supposed to know?

22 **MR. MILIAN:** That may not be a violation.

23 **THE COURT:** Where are you going to draw the line?

24 **MR. MILIAN:** I think you draw the line with photos
25 uploaded from the State of Illinois, that the person taking the

1 biometric information --

2 **THE COURT:** Based on an IP address?

3 **MR. MILIAN:** IP address, other geo location
4 information associated with the photo. All those things can
5 inform the business that wants to take that information where
6 this is coming from.

7 **THE COURT:** What you're saying is Facebook is
8 supposed to have -- it gets millions of photographs a day,
9 probably an hour. They are supposed to screen every
10 photograph --

11 **MR. MILIAN:** They already do for Texas, Judge. Texas
12 has a similar statute to BIPA. It doesn't have a private right
13 of action --

14 **THE COURT:** Do they had do this for non-users in
15 Texas?

16 **MR. MILIAN:** As to users. As to non-users --

17 **THE COURT:** They don't do that in Texas.

18 **MR. MILIAN:** We're getting kind of far afield, but
19 you asked the question.

20 **THE COURT:** It's nagging at me and the case has been
21 around now for two years. That's not the issue for today,
22 but --

23 **MR. MILIAN:** As to non-users --

24 **THE COURT:** If I were in your position, I would begin
25 thinking about how you're going to explain to me how this is

1 supposed to work out.

2 **MR. MILIAN:** And, again, Judge --

3 **THE COURT:** I mean, you know, if I drive through
4 Chicago and somebody a takes a picture of me and it gets tagged
5 on Facebook, I don't think that's what the BIPA was supposed to
6 address. That just seems more than -- I'm not a Facebook user.
7 So it just seems more than Illinois contemplated.

8 I don't think they were saying anybody who is for a minute
9 at O'Hare or, you know, somehow gets uploaded through a server
10 based in Chicago -- which can happen without you being
11 geographically in Illinois, by the way. I could be in
12 Wisconsin and it could be routed through a Chicago server. I'm
13 having a lot of conceptual -- for another day, okay? For
14 another day. Start thinking.

15 **MR. MILIAN:** And, Judge, we could address all of
16 those in ways that are -- one can comply with the statute,
17 because it's a negligence standard. It's a negligent or
18 intentional standard. It's not strict liability. And there
19 are reasonable things that create reasonable care that a user
20 could do and implement in order to ensure even non-users, who
21 are anonymously having their biometrics taken and they don't
22 know about it, you can still comply.

23 **THE COURT:** All right. We will save that for another
24 day. Okay.

25 **MR. MILIAN:** Thank you, your Honor.

1 **THE COURT:** Now, where are things generally? What's
2 happening?

3 **MS. GOLDMAN:** Your Honor, fact discovery closed on
4 November 17th. The parties had a meet-and-confer for the first
5 time that day on some discovery issues that the plaintiffs have
6 now identified and written the Court about. I think the
7 parties --

8 **THE COURT:** Discovery already closed.

9 **MS. GOLDMAN:** Discovery had closed. I think the
10 close of discovery was the Court's deadline for raising any
11 disputes.

12 The plaintiffs waited until then. We had our first
13 meet-and-confer that day. A week later, on the Friday after
14 Thanksgiving, they filed a letter --

15 **THE COURT REPORTER:** Counsel, your name, please?

16 **MR. HALL:** Sure. David Hall, Robbins Geller, on
17 behalf of plaintiffs.

18 We were dealing with several productions even that last
19 week up to the deadline. We were going by the local rule that
20 sets the deadline for such motions as a week after the
21 discovery cut-off. So we were complying with this Court's
22 local rulings.

23 The only extension, though, that -- the only discovery
24 that has gone beyond the original cut-off is one deposition.

25 **THE COURT:** You all agreed to that.

1 **MR. HALL:** Right, and that's been ordered.

2 Everything else is complete.

3 **THE COURT:** Okay. All right. I haven't seen -- did
4 I ask for a response?

5 **MS. GOLDMAN:** You did, and it's due next week, and
6 we'll be filing that.

7 Can I make one quick point just in one to counsel's point,
8 Mr. Millian's point?

9 **THE COURT:** Yes.

10 **MS. GOLDMAN:** The Gullen plaintiffs. A lot of what
11 he said was inaccurate. I don't think it's correct that --
12 first of all, the class is not defined that terms of IP
13 addresses. The class is defined in terms of Illinois
14 residents.

15 Second of all, we're not taking non-user biometrics. I
16 mean, we've said and we attached evidence to our standing
17 motion saying we don't collect or store or save any information
18 about non-users. So I just want to make that very clear.

19 Third of all --

20 **THE COURT:** So I don't -- I'm merely curious. I'm
21 not tying anybody's hands, but when you say that -- so if you
22 have a non-user show up in a photo and it gets tagged, what do
23 you do where that non-user?

24 **MS. GOLDMAN:** The tag -- okay. So it is actually
25 relevant to their claim of standing. They have never

1 identified any injury and the reason why not, they claim that a
2 photo of Mr. Gullen was uploaded and then some months later it
3 was tagged "Frederick W. Gullen." Discovery shown that it was
4 tagged that by his son a couple days before the Complaint was
5 filed.

6 That tag is not -- has nothing to do with Mr. Gullen's
7 face. It has nothing to do with any analysis of his face. All
8 that tag is is a tag that's associated with a particular
9 location on a particular photograph. It's -- there is no
10 biometric analysis associated with that tag at all.

11 **THE COURT:** That's what I was wondering.

12 **MS. GOLDMAN:** That is what discovery has shown.

13 **THE COURT:** This is a group photo or a photo of two
14 or three people, a non-user is in it.

15 **MS. GOLDMAN:** Correct.

16 **THE COURT:** And you don't harvest any of the --

17 **MS. GOLDMAN:** We harvest nothing. We know nothing
18 about him. We don't know who Mr. Gullen is. He has no account
19 on Facebook. We have no information about it. We don't know
20 how to reach him. We couldn't possibly give him notice or
21 obtain his consent.

22 Your example, you're in the Grand Canyon and take a
23 picture of your kids. Let's say they are from California. And
24 a guy in the background who is from Chicago is also visiting
25 the Grand Canyon with his family and he's in your photo. On

1 their theory you would have to give that guy notice and obtain
2 his consent. It's literally impossible.

3 **MR. MILIAN:** Judge, let me just interject.

4 The testimony is that Facebook creates a face print as to
5 everybody, because how does it know whether you're a user or
6 not to give you have an opportunity to tag your friend? It has
7 to analyze every photo. And it does. It creates a face print
8 of everybody.

9 What they claim they don't do is save non-user's
10 information in the long term. They certainly collect it, which
11 is a violation. They certainly use it to compare it to users
12 to see who is a user and who's not.

13 **THE COURT:** I don't know why I keep asking. I
14 shouldn't, but I'm just -- you're compelling me. It's a
15 riveting issue.

16 You say they collect it, but that's not what I'm hearing.
17 What I'm hearing is somebody uploads it. It is literally
18 resident on a Facebook server because it's been uploaded by a
19 user, but how is that collection by Facebook?

20 **MR. MILIAN:** They perform the same biometric scanning
21 of the non-user that they do to the user to determine who that
22 person is.

23 **THE COURT:** Your colleague just said that didn't
24 happen.

25 **MS. GOLDMAN:** We do, your Honor. The photo is

1 analyzed to see if it matches anything.

2 **THE COURT:** It is, okay. I misunderstood.

3 **MS. GOLDMAN:** The photo is analyzed because it's like
4 any other system where you have to see whether people are users
5 or non-users. But what we don't do is save any information
6 about them.

7 **THE COURT:** You analyze it. You just don't store it.

8 **MS. GOLDMAN:** Correct. We don't save it. We don't
9 store it. It's an ephemeral thing.

10 **THE COURT:** How is this going to come up again?
11 Summary judgment? When am I going to get through all this.

12 **MS. GOLDMAN:** It's probably going to come up a few
13 times. Certainly, at summary judgment.

14 **THE COURT:** A few times.

15 **MS. GOLDMAN:** Summary judgment and class
16 certification.

17 **THE COURT:** Class cert, okay.

18 All right. So discovery is closed. You had some
19 lingering disputes, which I will take care of.

20 Anything else happening?

21 **MR. MILIAN:** Not from the plaintiff's perspective.

22 **THE COURT:** Talking about settlement, for example?

23 **MR. HALL:** David Hall again for the plaintiffs.

24 We do have a class cert motion that will be filed in early
25 December, and I believe we have an early spring trial date, but

1 there hasn't been any movement on settlement efforts since our
2 failed mediation earlier this year.

3 **THE COURT:** Who was that with?

4 **MR. HALL:** That was with Judge Phillips, Layn
5 Phillips.

6 **THE COURT:** You did it privately?

7 **MR. HALL:** Right.

8 **THE COURT:** Would you like to use someone here, a
9 magistrate judge?

10 **MS. GOLDMAN:** Not at this time, your Honor.

11 **THE COURT:** No? Are you sure?

12 **MS. GOLDMAN:** Not at this time, your Honor.

13 **THE COURT:** Plaintiffs?

14 **MR. HALL:** We're open to pursuing it if Defendants
15 are when they are ready, but it sounds like they aren't.

16 **THE COURT:** Okay. All right. Thank you very much.
17 I'll get this out as soon as I can.

18 **THE CLERK:** All rise. Court is in recess.

19 (Proceedings adjourned.)
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23
24
25

CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Tuesday, December 5, 2017